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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

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7 TAEKKEUN YOON, et al.,

8 Plaintiff(s),

9 v.

10 THE TRAVELERS INDEMNITY COMPANY
11 Dba TRAVELERS HOME AND MARINE
INSURANCE COMPANY,

12 Defendant(s).

Case No. 2:20-CV-1507 JCM (EJY)

ORDER

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14 Presently before the court is defendant The Standard Fire Insurance Company's
15 ("Standard") motion to dismiss plaintiffs' second amended complaint. (ECF No. 27).
16 Plaintiffs Taekkeun Yoon and Su Jung Kim responded in opposition (ECF No. 30) to which
17 Standard replied (ECF No. 33).

18 **I. BACKGROUND**

19 This is a case about an insurer allegedly mishandling an underinsured/uninsured
20 motorist claim. Plaintiffs were rear-ended by non-party driver Bradley Biles. (Second Am.
21 Compl., ECF No. 24 ¶¶ 6–10). They suffered personal injuries and need ongoing treatment.
22 (*Id.* ¶¶ 12–13). Biles settled with plaintiffs for his full \$30,000 policy limit. (*Id.* ¶¶ 14–15).
23 Plaintiffs made a claim with Standard for their full \$100,000 per person and \$300,000 per
24 accident UIM policy limit. (*Id.* ¶¶ 16–19). They presented Standard "with \$43,624 in past
25 medical specials and \$21,375–\$44,375 in future medical specials" incurred by Yoon and
26 "\$29,663.20 in past medical specials and \$13,600–\$18,600 in future medical specials"
27 incurred by Kim. (*Id.* ¶¶ 24–27 (cleaned up)).
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1 After its investigation, Standard “made a final settlement offer . . . of \$6,500 for
2 [Yoon] and \$6,000 for [Kim].” (*Id.* ¶ 29). Standard has still not made any payments nor has
3 it provided “a reasonable explanation of the basis in the insurance policy, with response to
4 the facts of Plaintiff’s claim and the applicable law, for the denial of the UIM Claim or for an
5 offer to settle or compromise the UIM Claim.” (*Id.* ¶ 35). Plaintiffs allege five claims for
6 relief: (1) breach of contract, (2) contractual breach of the implied covenant of good faith and
7 fair dealing, (3) tortious breach of the implied covenant of good faith and fair dealing, (4)
8 violations of Nevada’s Unfair Claims Practices Act, and (5) declaratory relief. (*Id.* ¶¶ 50–
9 94). Standard now moves to dismiss under Rule 12(b)(6). (ECF No. 27).

10 **II. LEGAL STANDARD**

11 Federal Rule of Civil Procedure 8 requires every complaint to contain a
12 “short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R.
13 Civ. P. 8. Although Rule 8 does not require detailed factual allegations, it does require more
14 than “labels and conclusions” or a “formulaic recitation of the elements of a cause of action.”
15 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). In other words, a complaint
16 must have *plausible* factual allegations that cover “all the material elements necessary to
17 sustain recovery under *some* viable legal theory.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
18 562 (2007) (citation omitted) (emphasis in original); *see also Mendiondo v. Centinela Hosp.*
19 *Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008).

20 The Supreme Court in *Iqbal* clarified the two-step approach to evaluate a complaint’s
21 legal sufficiency on a Rule 12(b)(6) motion to dismiss. First, the court must accept as true all
22 well-pleaded factual allegations and draw all reasonable inferences in the plaintiff’s favor.
23 *Iqbal*, 556 U.S. at 678–79. Legal conclusions are not entitled to this assumption of truth. *Id.*
24 Second, the court must consider whether the well-pleaded factual allegations state a plausible
25 claim for relief. *Id.* at 679. A claim is facially plausible when the court can draw a
26 reasonable inference that the defendant is liable for the alleged misconduct. *Id.* at 678.
27 When the allegations have not crossed the line from conceivable to plausible, the complaint
28

1 must be dismissed. *Twombly*, 550 U.S. at 570; *see also Starr v. Baca*, 652 F.3d 1202, 1216
2 (9th Cir. 2011).

3 If the court grants a Rule 12(b)(6) motion to dismiss, it should grant leave to amend
4 unless the deficiencies cannot be cured by amendment. *DeSoto v. Yellow Freight Sys., Inc.*,
5 957 F.2d 655, 658 (9th Cir. 1992). Under Rule 15(a), the court should “freely” give leave to
6 amend “when justice so requires,” and absent “undue delay, bad faith or dilatory motive on
7 the part of the movant, repeated failure to cure deficiencies by amendments . . . undue
8 prejudice to the opposing party . . . futility of the amendment, etc.” *Foman v. Davis*, 371
9 U.S. 178, 182 (1962). The court should grant leave to amend “even if no request to amend
10 the pleading was made.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc)
11 (internal quotation marks omitted).

12 **III. DISCUSSION**

13 The gravamen of the second amended complaint is that Standard gave plaintiffs a
14 lowball final settlement offer. (ECF No. 24 ¶¶ 25–35; *see also* ECF No. 30 at 4 n.1
15 (“Defendant is alleged to have ultimately made an offer to Plaintiff that is approximately
16 \$7,000 below Plaintiff [sic] past medical specials, and does not account or [sic] any pain and
17 suffering or the cost of future medical treatment.”)). Aside from this, most if not all the
18 complaint is legal conclusions or formulaic recitations of elements or statutes. In fact,
19 *exactly the same formulaic recitations are pled under each claim.* (ECF No. 24 ¶¶ 54, 67,
20 84). Even so, the court will address some more specific defects of each claim in turn. But
21 plaintiffs may be able to cure some defects through amendment and, after all, the court did
22 not address the sufficiency of plaintiffs’ factual allegations in its first dismissal order. (*See*
23 ECF No. 23). Thus, dismissal is without prejudice and with leave to amend where
24 appropriate, giving plaintiffs a third and likely final bite at the apple.

25 **A. Breach of Contract**

26 Plaintiffs allege that Standard breached the contract by “failing to honor the UIM
27 insurance contract” and cite to subsections of Chapter 686A of the Nevada Administrative
28 Code. (ECF No. 24 ¶ 54); *see also infra* section III.C. They do not point to any “actual

1 provision of the insurance policy upon which a breach of contract claim” can be based.
2 (ECF No. 27 at 5). Plaintiffs’ breach of contract claim is DISMISSED without prejudice and
3 with leave to amend.

4 **B. Breaches of the Implied Covenant of Good Faith and Fair Dealing**

5 The implied covenant of good faith and fair dealing arises out of every contractual
6 relationship and “prohibits arbitrary or unfair acts by one party that work to the disadvantage
7 of the other.” *Nelson v. Heer*, 163 P.3d 420, 427 (Nev. 2007). Alongside this contractual
8 relationship is a special relationship between an insurer and its insured—akin to a fiduciary
9 relationship—which can create tort liability. *Allstate Ins. Co. v. Miller*, 212 P.3d 318, 325–
10 26 (Nev. 2009).

11 A contractual breach arises when “terms of a contract are literally complied with but
12 one party . . . deliberately countervenes the intention and spirit of the contract.” *Hilton*
13 *Hotels Corp. v. Butch Lewis Productions, Inc.*, 808 P.2d 919, 922–23 (Nev. 1991). In other
14 words, a contractual breach of the implied covenant cannot rest on the same conduct as a
15 breach of contract. *Jimenez v. GEICO Gen. Ins. Co.*, 448 F. Supp. 3d 1108, 1113 (D. Nev.
16 2020). The two claims can be alternative theories of liability but “all elements of each cause
17 of action must be properly pleaded.” *Id.* (citation omitted). Plaintiffs have made no
18 allegations that support a contractual breach of the implied covenant. In fact, in pleading the
19 claim, they allege that Standard “failed to honor the UIM insurance contract.” (ECF No. 24
20 ¶ 67); accord *McKinnon v. Hartford Ins. Co. of the Midwest*, No. 2:12-cv-1809-RCJ-CWH,
21 2013 WL 1088702, at *5 (D. Nev. Mar. 14, 2013) (dismissing a contractual breach of the
22 implied covenant claim).

23 As to a tortious “bad faith” breach, the insured must plausibly allege that “the insurer
24 had no reasonable basis for disputing coverage, and that the insurer knew or recklessly
25 disregarded the fact that there was no reasonable basis for disputing coverage.” *Powers v.*
26 *United Services Auto. Ass’n*, 962 P.2d 596, 604 (Nev. 1998) *opinion modified on denial of*
27 *reh’g*, 979 P.2d 1286 (1999). That is, bad faith requires an insurer’s denial of benefits to be
28 both objectively and subjectively unreasonable. *Rivas v. Gov’t Employees Ins. Co.*, No.

1 2:20-cv-306-JCM-NJK, 2020 WL 3128596, at *2 (D. Nev. June 12, 2020). And an insurer's
2 honest mistake, bad judgment, or negligence is not enough. *See Miller*, 212 P.3d at 330.

3 Again, the gravamen of the complaint is that Standard gave plaintiffs a lowball final
4 settlement offer. (ECF No. 24 ¶¶ 25–35). But an allegation that an insurer failed to pay or
5 reasonable settle a claim within the policy limits cannot support a bad faith claim.
6 *Schumacher v. State Farm Fire & Cas. Co.*, 467 F. Supp. 2d 1090, 1096 (D. Nev. 2006)
7 (“State Farm did not deny the claim, it just paid a different value than Schumacher requested.
8 Under the reasoning of *Pioneer*, this makes the complaint more of one based upon statutory
9 violations of NRS 686A.310 than it does a bad faith action.”); *Kuloloia v. Ohio Security*
10 *Insurance Co.*, No. 2:18-cv-405-JCM-PAL, ECF No. 25 at 4.

11 Or as Standard correctly puts it: “There is absolutely no explanation provided as to
12 why [its] counteroffers were unreasonable given the amount of medical treatment and the
13 prior payments [p]laintiffs received from the tortfeasor’s insurance policy.” (ECF No. 27 at
14 10). Plaintiffs’ contractual and tortious breaches of the implied covenant claims are
15 DISMISSED without prejudice and with leave to amend.

16 **C. Violations of Nevada’s Unfair Claims Practices Act**

17 To start, the complaint is littered with references to Chapter 686A of the Nevada
18 Administrative Code. (ECF No. 24 ¶¶ 33–34, 54, 67, 84).¹ Because the Nevada Department
19 of Insurance has exclusive jurisdiction over these regulations and plaintiffs have not pled that
20 they exhausted their administrative remedies, there is no claim for which relief can be
21 granted under these regulations. *Accord First Nat. Bank of Ely v. Progressive Cas. Ins. Co.*,
22 No. 3:11-cv-00859-RCJ-WGC, 2012 WL 5944847, at *6 (D. Nev. Nov. 27, 2012). Plaintiffs
23 do not dispute this in their opposition. (ECF No. 30).

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25 ¹ Plaintiffs explain these references as follows: “[T]he First Amended Complaint was
26 plead sufficiently as it relates to Plaintiffs’ bad faith claims. However, Defendant complained
27 that NRS 686A.310 was not referenced . . . enough. Therefore, and just to be sure, Plaintiffs
28 included more references to NRS 686A.310 in its Second Amended Complaint. Nevada is a
notice-pleading state and Defendants are certainly on notice that Plaintiffs are alleging that
Defendants did not live up to \their duty of care as set forth in NRS Chapter 686A and NAC
Chapter 686A.” (ECF No. 30 at 3). While Nevada may be a notice pleading jurisdiction,
this case is in federal court where the days of notice pleading are long gone. *See supra*
section II (discussing the *Twombly-Iqbal* pleading standard).

1 Aside from references to unenforceable insurance regulations, the rest of the fourth
2 claim—and most of the complaint—is “nothing more than the language of” Nevada’s Unfair
3 Claims Practices Act. *Chang v. CSAA Gen. Ins. Co.*, No. 2:14-cv-1411-GMN-CWH, 2015
4 WL 1443175, at *2 (D. Nev. Mar. 30, 2015); *see* (ECF No. 24 ¶¶ 54, 67, 84). These “type of
5 cut-and-paste” recitations of elements and statutes are “precisely what the Supreme Court
6 held to be insufficient in *Iqbal* and *Twombly*.” *Chang*, 2015 WL 1443175, at *2. Missing
7 are plausible allegations of what exact conduct by Standard—other than offering a lower
8 settlement amount—was an unfair claims practice. (ECF No. 27 at 8).² Plaintiffs’ claims
9 under Nevada’s Unfair Claims Practices Act are DISMISSED without prejudice and with
10 leave to amend.

11 **D. Declaratory Relief**

12 Declaratory relief is a remedy and not a standalone claim. *Antaredjo v. Nationstar*
13 *Mortg.*, No. 2:13-cv-1532-JCM-CWH, 2014 WL 298810, at *3 (D. Nev. Jan. 27, 2014).
14 This claim is thus DISMISSED with prejudice. But this dismissal does not preclude
15 plaintiffs from seeking declaratory relief as a remedy for their remaining substantive claims.

16 **IV. CONCLUSION**

17 Accordingly,

18 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Standard’s motion to
19 dismiss (ECF No. 27) be, and the same hereby is, GRANTED.

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25 ² Plaintiffs have the same pleading problems as the plaintiff in *Kuloloia*: “Plaintiff
26 argues that inherent in the factual allegation that Ohio Security offered \$80,000 in settlement
27 is the allegation that Ohio Security had no reason or explanation to justify such offer, that
28 Ohio Security failed to investigate the claim, and that Ohio Security therefore violated NRS
§ 686A.310. The court will not divine such inferences from the mere discrepancy of
plaintiff’s financial demands and Ohio Security’s settlement offer.” *Kuloloia*, ECF No. 25 at
5 (internal citations omitted).

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IT IS FURTHER ORDERED that plaintiffs may file a third amended complaint within 21 days of this order. Failure to do so with result in dismissal of this case with prejudice.

DATED May 17, 2021.


UNITED STATES DISTRICT JUDGE